SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 47
XA128/19

Lord Justice Clerk
Lord Glennie
Lord Woolman

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in the appeal

by

THE RIGHT HONOURABLE LORD KEEN OF ELIE, Her Majesty's Advocate General for Scotland, as representing the Secretary of State for the Home Department

Defender and Appellant

against

MICHELLE ADEWEMIMO ADIUKWU

Pursuer and Respondent

Defender and Appellant: McIlvride QC, Pugh; Morton Fraser LLP
Pursuer and Respondent: Crawford QC, Dewar; Drummond Miller LLP

14 August 2020

The nature of the respondent's case

[1] I am grateful to Lord Glennie for setting out the detail of the factual background of this case, and the pleadings, in his own opinion with which I am in agreement.

[2] This is a case which went to the sheriff for debate on the reclaimer's preliminary plea that the respondent's pleadings were irrelevant *et separatim* lacking in specification. The

focus of such a debate is, or should be, the averments made by the respondent, with such relevant averments by the reclaimer which may bear on the issue which is essentially whether the respondent has averred a relevant case from which it may be established that the Home Secretary was under a duty of care to her. The foundation of that alleged duty of care should be clearly specified in the pleadings. It is, I think worth taking a moment to examine what the respondent's written case is before turning to see how differently the case was eventually argued before the sheriff; and how differently again it was argued in this court. The written case is that:

> (a) The Home Secretary owed the respondent a duty to take care in the administrative implementation of the immigration decisions in her favour; more specifically she had a duty to ensure that the respondent received a status letter which she could use to obtain paid employment and/or access state benefits for herself and her children.
>
> (b) The Home Secretary was under a duty to obtemper both orders of the immigration tribunals and, ultimately, to issue the respondent with a status letter in implementation thereof.
>
> (c) The claim appears to be based entirely on foreseeability, although it is very baldly stated. The central averment is simply that the respondent knew or ought to have known that the respondent was entitled to be granted leave to remain in the United Kingdom as early as 15th December 2014. It is then averred that "as a consequence of the maladministration committed by the Home Secretary, or those acting on her behalf, the [respondent] suffered reasonably foreseeable, and predictable, financial loss and damage".

[3] It is hardly necessary to point out that these averments follow a false premise, as specified at paragraphs (a) and (b): the decisions of the respective tribunals did not involve making any order that the Home Secretary should issue a status letter. They determined that her removal would be a disproportionate interference with her article 8 rights. How to address that remained a matter for the Home Secretary. It may well be that in reality there

was little doubt that these decisions would be followed by the issuing of a status letter but the matter was nevertheless still one for the exercise by the Home Secretary of her section 4 discretion. None of this is the matter of any averment. I agree with Lord Glennie's observation that as far as predicated on assertions that the tribunals ordered the Home Secretary to grant leave to remain the case is irrelevant.

[4] It is striking that the pleadings contain no averments of any policy allegedly operated by the Home Secretary, the details of any policy, when and how it was put in place, the extent to which it was implemented in practice, how it might affect the respondent or any other matters of that kind. Notwithstanding this, the sheriff felt able to proceed on the basis that there was a policy that would have operated favourably towards the respondent on the basis of oral submissions made at the bar, and to base his decision to a degree on this. In my view that is an unsatisfactory way of proceeding. If a case is said to rest on the existence and operation of a policy those matters should be clearly made the subject of averment so that an informed and reliable understanding of the policy and its operation may be achieved. Proceeding on the basis of submissions made "on the hoof" is not appropriate. It is now said, orally, that there was "a systemic failure to ensure that policies are applied". This, rather than foreseeability, is now said to be the source from which a duty on the respondent may be deduced. How on earth this court could consider there to be a valid issue for inquiry on that matter in the absence of averments I cannot see.

[5] In the second place there are equally no averments of any kind such as would bring the case within the classification of the creation of a danger or the assumption of responsibility which may be relevant to the establishment of a duty of care for failing to confer a benefit, which at heart is what the respondent's case is. When the case has proceeded this far, I share your Lordships' reluctance to decide the issue on a mere pleading

point, but we should remind ourselves of the observations made by Lord Reed in *N and another* v *Poole Borough Council* [2018] 2 WLR 1478, para 82:

> "Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strikeout application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred."

[6] In short, whilst I do not suggest that the case should be determined purely on the basis of an absence of pleading, I do consider that if the absence of pleadings causes a difficulty in reaching a conclusion on any matter the benefit should be given to the appellant in the absence of any, let alone clear and detailed, pleadings. I also agree with the observations made by Lord Glennie about these matters at paragraph 11 of his opinion.

The legal issues

[7] The shifting sands which have bedevilled this area of the law over many years have been converted into firm terrain during a series of important decisions of the UKSC, notably *Michael* v *Chief Constable of South Wales Police* 2015 AC 1732; *Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736 and *N and another* v *Poole Borough Council*. The first significant area of clarification relates to the effect of *Caparo Industries plc* v *Dickman* [1990] 2 AC 605. These recent decisions have made it clear that *Caparo* should not be taken as establishing a universal tripartite test for the existence of a duty of care. On the contrary, in the ordinary case the court should continue to apply established principles of law. The *Caparo* test was appropriate when considering novel situations, where an incremental approach by analogy with established categories of liability was to be adopted. In such situations the question of whether it was fair, just and reasonable to impose a duty would be part of the assessment whether such an incremental step required to be taken.

[8] The sheriff did not rely on *Caparo,* having reached the conclusion that the matter was covered by the decision in *R (Kanidagli)* v *Secretary of State for the Home Department* [2004] EWHC 1585 (Admin), where the judge concluded that it was fair, just and reasonable that an administrative error of this kind, involving no judgment but simple administration and with a predictable financial effect, for which there was no other remedy, should be regarded as arising out of a sufficiently proximate relationship to found a claim for damages. Somewhat mystifyingly, the sheriff **concluded** that nevertheless, had he been required to go through a *Caparo* exercise himself he would have adopted the same general approach, notwithstanding that he tells us he "was not addressed in any detail in relation to the factors to be taken into account in applying the fair, just and reasonable test set out in *Caparo".* The sole basis for the sheriff's decision was that (a) *Kanidagli* applied; (b) the *ratio* of that case, namely that there was a sound basis for distinguishing *W* v *Home Office [1997] Imm AR 302,* was correct; and (c) the *ratio* had not been impliedly overturned by the appeal court in the case of *Mohammed & Ors* v *Home Office* [2011] 1 WLR 2862.

[9] I disagree. The decision in *Mohammed* was that the Home Secretary did not owe a common law duty of care to applicants for leave to remain in the United Kingdom to avoid maladministration in the exercise of her power to grant leave to remain under section 4(1) of the Immigration Act 1971. The argument which had been advanced was put solely on the basis that the court should follow *Kanidagli.* At paragraph 15 the Appeal Court made it clear that it did not think that the reasons given in *Kanidagli* for distinguishing *W* – the basis upon which the case had effectively succeeded – were valid. In *W*, the claimant had been held in immigration detention because of a crass administrative mistake, which could not be dignified as an error of judgment, yet the court held that no claim lay in negligence. I cannot read *Mohammed* as doing other than disapprove of the rationale of *Kanidagli.* In addition the

facts of this case are much closer to those of *Mohammed* itself. I do not therefore think the sheriff's reasoning can stand. However, in any event, I am not convinced that any of the three cases, *W, Kanidagli,* or *Mohammed,* assist in determining the correct approach to this case, given the extent to which understanding of the law in this area has been clarified and developed by *Michael, Robinson* and *N.*

[10] I turn then to examine the matter from the basis of the "established principles of law" referred to in *N*, further guidance about which was given succinctly by Lord Reed in para 65*:*

> "It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

It was accepted in submissions in this appeal that no duty of care arose directly from the relevant statute. Rather than focus on the way the case had originally been argued under reliance on *Kanidagli,* senior counsel accepted that the respondent's case had to come within paragraphs (1) or (3) of paragraph 65 of *N.* The respondent's argument was that the failure complained of did not arise in the course of the exercise of a statutory function or power by the Secretary of State; rather the failure arose in the course of the simple administration of something that required to be done by the Secretary of State. I confess that I have difficulty in understanding the distinction in the circumstances of this case. It seems to me that there is an essential circularity in the approach adopted for the respondent; it is accepted that

there is generally no liability for failing to confer a benefit, yet it is argued that that very failure is alone sufficient to create liability by reclassifying it as the creation of a danger. As with the arguments on assumption of responsibility it essentially rests on the proposition that a duty of care exists merely because there existed a statutory power the exercise of which could have conferred a benefit on the respondent.

[11] The respondent's case is in my view not one of causing harm to the claimant but is one of failing to confer a benefit on the respondent. It is thus a case falling within the established principle that a duty of care does not arise save in very limited exceptions, *viz*: where the defender has created the source of the danger or where there has been a voluntary assumption of responsibility. I have little difficulty in rejecting the suggestion that the Home Secretary created a source of danger for the respondent or that the situation may be equiparated with such a circumstance. The respondent was in no worse position following the decision of the First-tier Tribunal as a result of the Home Secretary's actions; the point of her claim is that the Home Secretary did not take action to put her in a better position. I find it very difficult to see how this can truly be equiparated with creating a source of danger for the respondent.

Assumption of responsibility

[12] The same applies to the question of assumption of responsibility. The basis upon which the Home Secretary may be said to have assumed responsibility towards the respondent is very difficult to identify. It was not identified in the pleadings and I remain unclear as to the basis of the current assertion.

[13] The principles underlying the circumstances in which a duty of care may be said to arise from an assumption of responsibility were examined by Lord Reed in *N* in

paras 66 - 73. The development was traced from early cases through *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC465 to *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145 and *Spring* v *Guardian Assurance plc* [1995] 2 AC 296. Lord Reed quoted the words of Lord Goff in the latter:

> "Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct."

[14] The argument that a public authority cannot assume responsibility merely by operating a statutory scheme, on the basis that the responsibility must be "voluntarily accepted or undertaken", was also examined specifically under reference to *Rowley* v *Secretary of State for Work and Pension*s [2007] 1 WLR 2861 *and X* v *Hounslow London Borough Council* [2009] EWCA Civ 286. At para 72 of N, Lord Reed noted:

> "The correctness of these decisions is not in question, but the dicta should not be understood as meaning that an assumption of responsibility can never arise out of the performance of statutory functions."

He went on:

> "the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne* and *Spring* v *Guardian Assurance plc.*"

[15] These criteria essentially relate to circumstances of the kind described in *Hedley Byrne* in the speech of Lord Morris of Borth-y-Gest, pp502-503

> "….. if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. … Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise".

[16] The situation is sometimes described (see the speech of Lord Devlin in *Hedley Byrne)* as being where the relationship between the parties is equivalent to a contractual one. I do not see that categorisation as valid in the present case. In *Gorringe* v *Calderdale Metropolitan Borough Council [*2004] 1 WLR 1057 Lord Hoffman (para 38) referred to circumstances where public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care. If we ask what has the Home Secretary done here or what relationship has she established to bring her within the scope of a duty of care? The answer is nothing: it is in reality purely based on a statutory power under section 4. In short, in my view nothing is relied on save the nature of the statutory functions and these do not suggest that there was any assumption of responsibility to the respondent to perform those functions with reasonable care.

[17] Accordingly, it is my view that the appeal must succeed.

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14 August 2020

Introduction

[18] This is an appeal from an interlocutor of the sheriff of Grampian, Highland and Islands sitting at Aberdeen dated 12 June 2019 repelling the defender's plea to the relevancy of the pursuer's case and allowing parties a proof of their averments.

[19] The appeal raises an important and, on one view, novel point of law as to whether, in circumstances where both the First-tier Tribunal and the Upper Tribunal (the "FtT" and the

"UT") have held that her refusal of an application for leave to remain was unlawful, and she has not sought to appeal the decision of the UT, the Secretary of State for the Home Department (the "Home Secretary") owes a duty of care to grant the applicant discretionary leave to remain and issue to the applicant a "status letter" confirming that she has such leave, thereby enabling the applicant to obtain employment and access welfare benefits, and to do that within a reasonable time of the decision not to seek to challenge the UT's decision.

[20] The pursuer and respondent is the applicant for leave to remain. I shall generally call her "the pursuer", but given her status at certain material times it is convenient sometimes to refer to her as "the applicant". She claims damages in the amount of £56,000 in respect of loss and damage allegedly suffered by her as a result of the Home Secretary's failure to issue her with the appropriate status letter for some 20 months between March 2015, when the UT found in her favour, and November 2016, when the letter was eventually issued. She contends in her pleadings that this failure prevented her from obtaining employment as a lawyer within the United Kingdom, she having obtained a law degree in Nigeria and a Masters in Oil and Gas Law at Robert Gordon University in Aberdeen; that it prevented her from accessing benefits of any kind for herself and her children to which she would otherwise have been entitled if unable to obtain employment; and that it made it impossible for her to pay her rent, as a result of which she was evicted from her accommodation and forced to seek refuge in emergency accommodation.

[21] The defender and appellant is the Advocate General for Scotland. He is sued as the appropriate Law Officer in respect of these proceedings in terms of s.4A of the Crown Suits (Scotland) Act 1875. For all practical purposes, the defender and appellant is the Home Secretary. I shall refer to them as "the defender".

[22] Recognising that the appeal raised both complex and possibly novel points of law, the Sheriff Appeal Court on 29 October 2019 remitted the appeal to the Court of Session under section 112 of the Courts Reform (Scotland) Act 2014.

Outline Facts

[23] The assumed facts relevant to this appeal fall within a narrow compass. Sections 3 and 4 of the Immigration Act 1971 entitle the Home Secretary to grant a person leave to remain in the United Kingdom for a limited or an indefinite period. On 16 March 2010 the applicant applied for leave to remain, her application being based on Article 8 ECHR, the right to respect for private and family life. Her application was refused in December 2010. In December 2013[1] the applicant appealed to the FtT (Immigration and Asylum Chamber) against that refusal. On 31 July 2014, the FtT allowed the applicant's appeal. The Home Secretary appealed to the UT. On 16 March 2015 that appeal was refused. The Home Secretary did not seek to challenge the decision of the UT refusing her appeal. She became, to use the jargon, "appeal rights exhausted". We were not taken specifically to the reasoned decisions of either the FtT or the UT, but those decisions were included in the productions in this case and we have read them as part of the background to our consideration of the issues. The sheriff records in paragraph 2 of his Note that it was a matter of agreement that those decisions were to the effect that removal of the applicant from the UK was incompatible with her rights under Article 8 ECHR.

[24] It appears to have been a matter of agreement before the sheriff – though the matter is not referred to at all in the pursuer's pleadings and no such agreement was recorded in a

[1] Some explanation of the delay of three years between the Home Secretary's decision and the appeal to the FtT is contained within the decisions of the FtT and the UT, but the delay is of no importance for present purposes.

joint minute or any other written document – that there was in existence at the time relevant Home Office policy guidance stating that persons in the class of the pursuer should be granted discretionary leave to remain for up to 30 months. The sheriff records it in this way in paragraph 2 of his Note:

> "The Secretary of State has published policy guidance that provided between 2010 and 8 July 2012 a person whose removal from the UK would be incompatible with Article 8 of the ECHR should be given discretionary leave to remain for up to three years. From 9 July 2012, the policy changed so that, subject to certain exceptions, the maximum period of discretionary leave which would be granted at any one time was thirty months. The grant of leave to remain is dealt with by issuing a 'status letter'".

The full text of the relevant guidance is set out by Lord Doherty at para [15] of his Opinion in *DM Ptr* [2013] CSOH 114. It is convenient to quote it in full:

> "[15] At the material times the Secretary of State's published policy guidance was as follows:
>
> <u>Discretionary leave to remain - Immigration Rule 395C</u>
>
> Chapter 53 of the EIG provided guidance on the 'relevant factors' to which UKBA officials should have regard in terms of rule 395C before making a decision on removal under section 10 of the Immigration Act 1999. The version of Chapter 53 which was extant immediately before April 2008 provided:
>
> 'Should the decision maker conclude that removal is not appropriate then leave outside the Rules should be granted. Such leave should generally be Indefinite Leave to Remain unless limited leave or deferred removal is the appropriate course of action to take. However, each case must be considered on its own individual merits.'
>
> Between April 2008 and 19 July 2011 Chapter 53 did not prescribe the length of time for which leave to remain should be granted in the event of a decision not to remove on Rule 395C grounds. From 20 July 2011 until rule 395C was revoked on 13 February 2012 Chapter 53 provided that in such circumstances discretionary leave to remain for a period of up to three years should be granted.
>
> <u>Discretionary leave to remain - article 8</u>
>
> Between 2010 and 8 July 2012 a person whose removal would be incompatible with article 8 ECHR should be given discretionary leave to remain for up to three years.
>
> <u>Discretionary leave to remain - change in policy</u>

> From 9 July 2012 the policy changed so that, subject to certain exceptions, the maximum period of discretionary leave which would be granted at any one time was 30 months."

The present case concerns events after July 2012, so the policy with which we are concerned was that, subject to certain exceptions (which neither party has suggested are relevant here), once it had been determined that an applicant's removal from the United Kingdom would be incompatible with Article 8 ECHR, that applicant should be given discretionary leave to remain for up to 30 months.

[25] It is contended by the pursuer, and I did not understand it to be disputed, that without the grant of a status letter a person will find it impossible to obtain employment and access welfare benefits.

[26] The Home Secretary did not issue the pursuer with a "leave to remain" status letter, until November 2016. No explanation for the delay between March 2015 and November 2016 has been provided. It is not said that the delay was due to any requirement on the part of the Home Secretary to make further enquiries or to exercise a discretion as to whether or not to issue a status letter in light of the UT's determination of her appeal, or to any need to resolve some question as to the applicability of her policy to the case of the pursuer. At paragraph 9 of his Note, the sheriff records the position adopted by Mr Pugh on behalf of the Home Secretary:

> "He summarised the factual basis of the case categorising the failure on the part of the defender as a delay in granting the pursuer leave to remain. No explanation is given in the defender's pleadings for the delay in issuing a status letter. Mr Pugh explained that there was no dispute but that there was a delay. The Secretary of State accepts that. From the date of the Upper Tribunal's decision the natural consequence was that leave to remain should have been granted to the pursuer. No explanation was offered in submissions. It was accepted that the defender simply failed to do something which should have happened, namely the issuing of the status letter."

That position taken before the sheriff reflects the position adopted by Mr McIlvride QC on behalf of the Home Secretary before this court.

The pursuer's pleadings

[27] Since the matter comes before this court on the question of relevancy, it is of some importance to examine the pleadings. Article 2 of Condescendence sets out in narrative form the decisions made leading to the point where the Home Secretary became appeal rights exhausted. Article 3 avers that in those circumstances the Home Secretary came under certain duties:

> "3. The Defenders knew or ought to have known that the Pursuer was entitled to be granted leave to remain in the United Kingdom as early as 15th December 2014. That entitlement was expressly recorded in writing on 16th March 2015. It is explained and averred that the Home Secretary owed the Pursuer a duty to take care in the administrative implementation of the immigration decisions in her favour. More particularly, the Home Secretary owed the Pursuer a duty to ensure that she received a status letter which she could use to obtain paid employment and/or access state benefits for herself and her children. …"

The relevance of 15 December 2014 appears to be that this was the date of the hearing at which the UT indicated that it was minded to refuse the appeal from the FtT. We are not concerned with that in this appeal. The UT's formal decision is dated 16 March 2015. The nub of the pursuer's case on breach of duty is set out in Article 4 of Condescendence. This reads as follows:

> "4. Despite repeated requests by the Pursuer, the Secretary of State for the Home Department refused or at least delayed to issue the Defender with leave to remain until in or around November 2016. The Home Secretary was under a duty to obtemper both orders of the immigration tribunals and, ultimately, to issue the Pursuer with a status letter in implementation thereof. It is averred that the Home Secretary, or those acting on her behalf, ought to have done so within a reasonable time; and the Secretary of State was under a duty to issue the leave to remain to the Pursuer within a reasonable period. By not so doing the Secretary of State for the Home Department failed in their (*sic*) duties and were wilfully negligent. As a consequence of the maladministration committed by the Home Secretary, or those acting on her behalf, the Pursuer suffered reasonably foreseeable, and predictable,

> financial loss and damage. But for the Home Secretary's failure(s) (or the failure(s) of those acting on her behalf) to obtemper and implement the orders of the immigration tribunals, at all or within a reasonable time, the loss and damage would not have occurred. …"

The alleged duty is encapsulated in the pursuer's first plea-in-law as follows:

> "1. The Pursuer having suffered loss and damage through fault on the part of the Secretary of State for the Home Department, is entitled to reparation from them therefor."

The reference in Article 4 to "maladministration" is not supported by averments of malice or want of probable cause, a matter to which I return briefly below, nor is it followed through to any appropriate plea-in-law. All that is focused in the plea-in-law is "fault", which, in light of what has gone before, presumably refers to alleged breaches of the duties identified in Article 3, namely the duty "to take care in the administrative implementation of the immigration decisions in [the pursuer's] favour", and Article 4, namely the duty "to obtemper [within a reasonable time] both orders of the immigration tribunals and, ultimately, to issue the Pursuer with a status letter in implementation thereof".

[28] I shall refer in due course to the submissions before this court, but it should be noticed at this stage that Ms Crawford QC, who appeared for the pursuer before us (though she did not appear in the sheriff court), focused her arguments not on the alleged duties set out in the passages quoted but on an assumption of responsibility by the Home Secretary. That was said to arise to a significant extent from the existence of the policy guidance referred to above. This line of argument does not feature in the pursuer's pleadings. Legal arguments do not require to be set out in terms. However, in so far as the assumption of responsibility is based upon anything said or done by the Home Secretary, or the Home Office, those facts should be averred. It is a matter of some concern that, in a procedure focused on the relevance of the pursuer's pleadings, those pleadings do not even mention

the key elements of her case. For my part I would not wish to decide this case in the absence of averments on this critical point, but it seems to me that if this matter is to proceed further in the sheriff court, whether by way of proof or proof before answer, the pursuer should be required to amend so as to make relevant averments of all matters relied upon in support of her argument, including in particular the terms of the relevant guidance, its statutory or other basis, and the impact of that guidance on the arguments anent the existence or otherwise of the duty of care contended for, as well as any actions of the Home Secretary or those acting on her behalf upon which the pursuer relies to justify the assumption of responsibility argument. This is not an insistence on procedural niceties for their own sake. These key matters will be of direct relevance to the success or otherwise of the pursuer's case; and the question of whether the policy applied to the pursuer's case, or whether the Home Secretary was entitled to disapply it, may also be of relevance. That latter point is hinted at in the pursuer's Note of Argument where she says that the Home Secretary "has not argued that the policy did not, or should not, apply to the pursuer", a statement of fact which may well be correct, though it is difficult to see where such an argument would be made by the Home Secretary, in the pleadings at least, when the policy itself is not mentioned by the pursuer. Other points of importance are similarly not mentioned in the pleadings. It is said by the pursuer in her Note of Argument that the status letter entitles the person to whom it is issued to obtain employment and access welfare benefits. That, too, does not appear to be in dispute, but it is not apparent from the pursuer's pleadings in the sheriff court action whether this is said to be the legal effect of the issue of a status letter or, conversely, whether the position is simply that the practical consequence of not having such a letter is that one is prevented from obtaining employment and accessing such benefits. This too would benefit from elaboration.

[29] I do not suggest, however, that we decide the case on the basis of the deficiencies in the pursuer's pleadings. The point of law raised in this case is capable of being decided on the pleadings as they stand as amplified in the course of submissions.

The debate in the sheriff court and the sheriff's decision

[30] Before the sheriff, it was argued on behalf of the Home Secretary that no duty of care was owed to the pursuer in circumstances where the Home Secretary was simply fulfilling her statutory function. There was authority against there being any such duty of care (*W* v *Home Office* [1997] Imm AR 302 and *Mohammed* v *Home Office* [2011] 1 WLR 2862). *Esto* those cases were not decisive, the court should proceed incrementally from the existing authorities. There was no basis upon which it could be held that there was a relationship of proximity between the defender and the pursuer or that it was fair, just and reasonable to impose a duty of care (*Caparo Industries plc* v *Dickman* [1990] 2 AC 605). On behalf of the pursuer, reliance was placed upon the decision of Keith J in *R (Kanidagli)* v *Secretary of State for the Home Department* [2004] EWHC 1585 (Admin). It was submitted that that case was clear authority for the proposition that a duty of care was owed by the Home Secretary in a case such as this. *Esto* that case was not on all fours with the present, it provided the basis for the court in this case, proceeding incrementally, to hold that a duty of care was owed to the pursuer.

[31] It is apparent from the sheriff's Note that the argument before him came to be focused almost exclusively on the question whether the judge in *Kanidagli* had correctly distinguished the reasoning of the Court of Appeal in *W*; and whether the reasoning in *Kanidagli* had in its turn been disapproved by the Court of Appeal in *Mohammed*. The sheriff accepted the arguments advanced on behalf of the pursuer, held that *Kanidagli* had correctly

distinguished *W* and had not been disapproved in *Mohammed*, and concluded that *Kanidagli* determined the issue in the pursuer's favour. In any event, the decision in *Kanidagli* provided a sound basis for holding, on an incremental basis, that the relationship between the pursuer and the Home Secretary was sufficiently proximate and that it was fair, just and reasonable to impose such a duty.

[32] Accordingly, he repelled the first plea in law for the defender (a plea to the relevancy of the action) and appointed the case to a proof. For my part, if we had otherwise been in favour of the pursuer, I would have thought that the appropriate disposal was to order a proof before answer, rather than a proof simpliciter.

Submissions before this court

[33] For the Home Secretary, Mr McIlvride invited the court to allow the appeal, sustain the first plea in law for the defender and dismiss the action.

[34] He submitted that, in Scots law, a public official will be liable in damages for maladministration in exercising his or her public functions only if proved to have been acting with malice or want of probable cause: *Micosta SA* v *Shetland Islands Council* 1986 SLT 193, Lord Justice-Clerk Ross at 198G-I, *Shetland Line (1984) Ltd* v *Secretary of State for Scotland* 1996 SLT 653, Lord Johnson at 658 sub-para.(5); and see also *Kiani* v *Secretary of State for Business, Innovation and Skills* [2013] CSOH 121, Lord Hodge at para [17] and *Philp* v *Highland Council* [2018] CSIH 53, Lord President Carloway, giving the judgment of the court, at paras [34]-[35]. The pursuer made no averments of malice or want of probable cause. It was not enough for the pursuer to say, as she did say in her written submissions, that malice could be inferred from the conduct of the Home Secretary in failing to issue a status letter without any attempt to explain how that failure occurred. The only question for

determination was whether the pursuer's pleadings were relevant for enquiry. As already observed, those pleadings made no mention of malice or want of probable cause, either expressly or by inference. Accordingly, in so far as the case was based upon maladministration, it was irrelevant.

[35] Mr McIlvride submitted that the Home Secretary owed no duty of care to the pursuer to issue a status letter within a reasonable time. In so far as the pursuer's case was based in negligence, it was bound to fail and was irrelevant. *Kanidagli*, upon which the sheriff had based his decision, was wrongly decided and had been disapproved by the Court of Appeal in *Mohammed*. The 1971 Act conferred a power on the Home Secretary to grant leave to remain but did not impose any duty on her in that respect. Even if the effect of the FtT and UT decisions was to leave the Home Secretary with no alternative but to issue the pursuer with a status document, so that her failure to do so within a reasonable time or at all might be susceptible to judicial review, it did not follow that that public law duty, to use that shorthand, transposed into a duty of care at common law. Mr McIlvride referred us to the decision of the House of Lords in *Gorringe* v *Calderdale MBC* [2004] 1 WLR 1057 for the statement by Lord Hoffmann that where a statute did not create a private right of action, "it would be, to say the least, unusual if the mere existence of the statutory duty could generate a common law duty of care" (para 23); and he found it "difficult to imagine a case" in which a common law duty could be founded simply upon the failure, however irrational, to provide some benefit which a public authority has power, or even a public law duty, to provide (para 32). Those observations were reflected in the judgment of Sedley LJ in *Mohammed* at para 14: "As a general rule the proximity created by a statutory relationship does not by itself create a duty of care". Particular reliance was placed on two recent Supreme Court decisions (*Robinson* v *Chief Constable of West Yorkshire* [2018] AC 736 and *N* v

Poole Borough Council [2019] 2 WLR 1478) which both explained the development of the common law in this area up to and including the decision in *Caparo*, and sought to establish a coherent framework for the assessment of whether a duty of care is owed by a public body in any particular case. In *Robinson* at para 29 Lord Reed explained that, properly understood, *Caparo* achieved a balance between legal certainty and justice. He pointed out that in the ordinary case the courts generally consider what has been decided previously and follow those precedents. In other cases, where the question of the existence of a duty of care has not previously been decided, the courts consider the closest analogy in the existing law with a view to maintaining legal coherence and the avoidance of inappropriate distinctions; and they also weigh up the reasons for and against imposing liability in order to decide whether the existence of a duty of care would be fair, just and reasonable. Mr McIlvride submitted that the previously decided cases of *W* and *Mohammed* already established that no duty of care existed in a case such as this. In so far as those cases did not provide a complete answer to the question whether a duty arose in the present case, they were the cases most closely analogous to the present. No incremental development of the common law starting from those cases would permit a finding that the Home Secretary owed a duty of care in the present case. In *N*, a case about whether certain provisions of the Children Act 1989 gave rise to a duty of care, Lord Reed took the opportunity of clarifying what he called the "shifting approaches by the highest court" on the issue of the liability of public authorities for their conduct of their statutory powers and duties: see para 25. At para 28, Lord Reed pointed out that, like private individuals, "public bodies did not generally owe a duty of care to confer benefits on individuals", but that, as in the case of private individuals, "a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as for example where the public body had created the

source of danger or have assumed responsibility to protect the claimant from harm". He deliberately drew the distinction between "causing harm (making things worse) and failing to confer a benefit (not making things better)" rather than the more traditional distinction between acts and omissions, and Mr McIlvride submitted that the present case was one in which it was being asserted that the Home Secretary owed a duty to confer a benefit. At para 65 Lord Reed gave the following summary of the relevant principles concerning the potential liability of public authorities (I quote it in full because it assumed centre stage in the argument before us):

> "65 It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

Mr McIlvride submitted that the present case effectively fell within that second category. The Home Secretary could confer a benefit on the respondent in the exercise of her statutory functions, but did not owe a duty of care to do so. The pursuer's argument depended entirely upon the statutory relationship of the Home Secretary towards the pursuer. The pursuer's attempt to translate that statutory relationship into an assumption of responsibility by the Home Secretary was bound to fail. There was no basis upon which to hold that the Home Secretary had assumed the responsibility to the pursuer. The only relevant facts were that the tribunals refused the Home Secretary's appeal and that, in light of that refusal, the matter went back to the Home Secretary to operate the statutory scheme.

[36] Mr McIlvride submitted that, even if the relationship of proximity was established, it was neither fair, just nor reasonable to impose a duty of care in a case such as this. The losses sought to be recovered were pure economic losses, in respect of which the courts are slow to create duties of care. And in any event the pursuer had other remedies, whether by judicial review, or a claim under Article 8 ECHR, or, as noted in *Mohammed* at paras [25]-[26], by seeking assistance from the Parliamentary Ombudsman.

[37] For the pursuer, Ms Crawford QC invited the court to refuse the appeal, alternatively to allow it only to the extent of appointing the matter to a proof before answer, leaving all pleas standing, rather than a proof simpliciter.

[38] Ms Crawford made it clear that she was not advancing a case of "maladministration" in support of which it would be necessary to show malice or want of probable cause: *Micosta*. However, if malice or want of probable cause were necessary in order to instruct a case that the Home Secretary was in breach of a common law duty of care, then it could be established from the fact of the unexplained delay and the absence of any attempt to argue that consideration was being given to departing from the policy – in other words it was a case where there was no real exercise by the Home Secretary of her statutory function.

[39] Ms Crawford's primary submission was that the duty of care incumbent on the Home Secretary was based on orthodox principles of negligence. It arose in respect of her failure to take reasonable care in the exercise of a purely administrative or operational act. She contrasted this with what she described as the Home Secretary's erroneous contention that the pursuer sought to impose a common law duty of care in respect of the discharge of a statutory power. The distinction was well illustrated by comparing the cases of *W* and *Mohammed* with the decision of Keith J in *Kanidagli*. In *W* and *Mohammed* the Home Secretary still had something to investigate and determine. Whatever the nature of the

failure, it occurred in the course of exercising the statutory discretion. By contrast, in *Kanidagli*, once the tribunals had made their decisions and it had been resolved that there was to be no further appeal, all that remained for the Home Secretary was to issue the status letter in accordance with the then existing policy. That was a critical distinction which the Court of Appeal in *Mohammed* had failed to recognise.

[40] Ms Crawford submitted that the Home Secretary had assumed responsibility to take care to grant the pursuer leave to remain and to issue a status letter within a reasonable time. A number of factors were relied upon in support of the assumption of responsibility argument. They were: (i) the decision of the UT; (ii) the lack of challenge to that decision; (iii) the Home Secretary's policy designed to regulate dealings with, and to ensure continuity of decision-making in respect of, a defined class of persons, i.e. granting discretionary leave of up to 30 months to those whose enforced removal from the United Kingdom would contravene ECHR; (iv) the absence of a departure from that policy; (v) the fact that leave to remain was required to access welfare benefits and employment; (vi) the 20 month delay in granting leave to remain. Ms Crawford also relied on: (vii) the fact that the pursuer forms part of a limited and identifiable class; and (viii) the absence of any suggestion that a duty of care would not impose any undue burden on the Home Secretary timeously to carry out her administrative functions. Put compendiously, this was a case where it could be said that the Home Secretary had created the source of danger, viz the inability of a person in the position of the pursuer to access benefits or obtain work without a status letter, or at least had control over it; she had set up a system for the issuing of a status letter to an applicant who, in light of decisions by the FtT and the UT could not lawfully be removed on ECHR grounds; and she was aware of the need to issue such a letter within a reasonable time, since without it the applicant would be likely to suffer hardship.

In light of all that it could properly be said that she had assumed responsibility for the issuing of such a letter within a reasonable time.

[41] Thus understood, the case fell within classic common law principles instructing a case of negligence. Public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles: see *N*, Lord Reed at paras 64 and 65. Lord Reed makes it clear in *N*, at para 65, that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties the exercise of which might prevent a person from suffering harm; but he emphasises, at para 72, that previous cases should not be understood as meaning that an assumption of responsibility can never arise out of performance of statutory functions; it may do if the conduct of the authority pursuant to its statutory duties meets the criteria set out in cases such as *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465 and *Spring* v *Guardian Assurance plc* [1995] 2 AC 296. Each case requires attention to be directed to the detailed circumstances of the particular case and the particular relationship between the parties: *Gorringe*, per Lord Steyn at para 2; *Customs & Excise Commissioners* v *Barclays Bank plc.* [2007] 1 AC 181, per Lord Bingham of Cornhill at para 8 and per Lord Mance at para 93. The pursuer does not seek to impose on the Home Secretary a common law duty based solely on the existence of a public law duty.

[42] *Esto* the case was properly classed as "novel", Ms Crawford submitted that it met the incremental approach. She relied on a number of cases – *Kanidagli, McCreaner* v *Ministry of Justice* [2015] 1 WLR 354 and *Sebry* v *Companies House* [2016] 1 WLR 2499 – as illustrating situations in which a public body was found to be under a duty of care at common law for actions taken, not at the stage where a discretion was being exercised and a judgment made about what action to take, but at the later stage where all that was left was implementation

of the decision which had been arrived at. The headnote in the law report of *Mohammed*, she submitted, accurately stated the *ratio* in the case and, far from being against her, in fact supported this distinction. *W* was a case where the wrongful action, the "crass administrative mistake" as Sedley LJ called it in *Mohammed*, did not of itself involve the exercise of any decision making judgment, but it occurred during the stage where the Secretary of State still had a decision to make on the merits of the application for leave to remain. *W* was correctly distinguished on that basis in *Kanidagli*. For the same reasons, both *W* and *Mohammed* were correctly distinguished in *McCreaner*. These cases suggested that there was a sound basis for proceeding by analogy and holding there to be a common law duty of care in the present case.

Analysis and Decision

[43] Before turning to consider the critical arguments in this case, it is useful to clear away some of the incidental issues which have raised their heads.

Maladministration

[44] It is important to remind oneself that this is not a case where the pursuer advances a case of maladministration in the *Micosta* sense, in support of which it is necessary to prove malice or want of probable cause. Ms Crawford expressly disclaimed any such contention and the pursuer has, in any event, no pleadings to support such a case. Although there is a reference to "maladministration" in Article 4 of Condescendence, that stands alone and can be disregarded in light of Ms Crawford's disclaimer.

[45] Ms Crawford rather faintly suggested that if it were necessary to show malice, that could be found in the Home Secretary's failure to put forward any explanation for failing to issue the status document for some 20 months. I do not understand how this point arises.

If, as Ms Crawford concedes, the pursuer's case is based upon there being a duty of care owed to her by the Home Secretary, breach of such duty is established by proof that due care was not in fact taken. In those circumstances it is not contended on behalf of the Home Secretary that the pursuer would have to go further and prove malice or want of probable cause. However, in any event, it simply will not do to raise the question of malice without there being any averment of malice in the pleadings. If malice is to be part of the pursuer's case it must be pleaded with full particularisation, even if it focuses mainly or even exclusively upon an inference sought to be drawn from the absence of any explanation by the Home Secretary for her failure to issue the document. In this respect it is akin to an allegation of fraud, as to which see *Royal Bank of Scotland plc* v *Holmes* 1999 SLT 563, Lord Macfadyen at 569-570.

Applying the tribunals' decisions

[46] A substantial part of the pursuer's case is based on the assertion that the Home Secretary had a duty "to obtemper both orders of the immigration tribunals and, ultimately, to issue [the applicant] with a status letter in implementation thereof". Ms Crawford did not support this line of argument in her submissions. And rightly so, because neither the FtT nor the UT made any order directing the Home Secretary to grant leave to remain or to issue a status letter in accordance with her policy. They had no power to do so. Those tribunals found only that the applicant's removal from the United Kingdom would amount to a disproportionate interference with her and her family's Article 8 rights. It was then for the Home Secretary to decide whether to seek to challenge those decisions or, if there was to be no further challenge, to determine how to act consistently with them. In so far as the case for the pursuer is premised upon an assertion that the tribunals ordered the Home Secretary

to grant leave to remain, and that the Home Secretary was bound to obtemper such orders, the action is plainly irrelevant.

[47] The averment in Article 3 of Condescendence, that the Home Secretary owed the pursuer duties "to take care in the administrative implementation of the immigration decisions in her favour" and "to ensure that she received a status letter which she could use to obtain paid employment and/or access state benefits for herself and her children.", deserves more attention. It is in support of these averments that the pursuer advances her argument that the Home Secretary owed the pursuer a duty of care to protect her from harm (or to confer a benefit on her) by issuing, within a reasonable time of the promulgation of the UT decision (and the expiry of the time for appealing against it), a status document enabling her to obtain employment and/or to access benefits.

A public law duty?

[48] In her written and oral submissions, Ms Crawford emphasised that the pursuer does not argue that the Home Secretary owed her any duty of care to exercise reasonable care to protect her from harm, or to confer a benefit on her, when discharging statutory functions and duties under the 1971 Act. But she argues that after the decision had been taken not to challenge the decision of the UT, the only option available to the Home Secretary in terms of her own guidance was to grant the pursuer discretionary leave to remain for a period of up to 30 months and to issue the pursuer with a status document enabling her to obtain work and/or access benefits. By that stage there were no other alternatives open to the Home Secretary (I leave out of account that there was in theory at least still a decision to be made as to the length of the period in respect of which discretionary leave to remain would be granted). She was under a public law duty to act in this way. That public law duty to act, and to act in a particular way, was an important plank in the argument that the Home

Secretary also owed the pursuer a common law duty to take reasonable care to do these things within a reasonable time. It was not clear to me, in listening to his submissions, whether Mr McIlvride accepted that the Home Secretary was under a public law duty to act in this way during that period and that her failure to do so put her in breach of that public law duty.

[49] On this limited aspect of the case I consider that Ms Crawford is correct. Once the UT had upheld the decision of the FtT to the effect that the removal of the pursuer from the United Kingdom would amount to a disproportionate interference with her and her family's Article 8 rights, and once the Home Secretary had determined not to challenge that decision and had become appeal rights exhausted, then in terms of her own policy the Home Secretary was required to grant the pursuer discretionary leave to remain for a period of up to 30 months. It is, to my mind, axiomatic that she should do so within a reasonable time. If she did not do so, she would have been susceptible to an order made by the court on a petition for judicial review. Standing the terms of her own policy, it is difficult to see what answer there could have been. That is what I refer to when I say that the Home Secretary was under a public law duty to act in this way. But I need not decide that finally for present purposes. It would be sufficient for the pursuer, in an argument anent the relevance of her pleadings, to maintain that it is at least arguable that the Home Secretary would have been compelled by judicial review to issue her with discretionary leave to remain in accordance with her policy and issue her with a status document. I consider that that is indeed highly arguable; and for the purpose of the discussion that follows I proceed upon the basis that the Home Secretary did indeed owe the pursuer a public law duty to grant discretionary leave to remain and issue her with the status document.

[50] Having said all that, however, I am not persuaded that this point takes the pursuer very far. In *Gorringe* v *Calderdale MBC* [2004] 1 WLR 1057, a case concerned with the extent of the public law duty of a highway authority to maintain the highway and whether that public law duty translated into a duty of care at common law, the House of Lords appears not to have considered that its analysis would have been any different depending upon whether the failure by the public authority was a failure to exercise a power or a failure to act in accordance with a public law duty: see, for example, Lord Hoffmann at para 32. One can see the logic in saying it is more difficult to fashion a common law duty of care out of a public law power, since the decision by the authority as to whether or not to exercise a power involves a measure of policy, judgement and discretion on their part; but it does not follow from this that a common law duty of care will readily be implied in the case of the authority being under a public law duty.

[51] The difference between a power and a duty overlaps to a large extent with the distinction, relied on by the pursuer, between policy (i.e. exercising discretion or judgment) and operations (implementation of whatever policy decision has been reached). This distinction was addressed by Lord Hoffmann in *Stovin* v *Wise* [1996] AC 923, where he said (at page 951):

> "There are at least two reasons why the distinction [i.e. between policy and operations] is inadequate. The first is that … the distinction is often elusive. … But another reason is that even if the distinction is clear cut, leaving no element of discretion in the sense that it would be irrational (in the public law meaning of that word) for the public authority not to exercise its power, it does not follow that the law should superimpose a common law duty of care."

He went on, at page 953, as follows:

> "In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are

> exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised."

In *N*, at para 31, under reference to these passages, Lord Reed spoke of the distinction between policy and operations having been "rejected" in *Stovin* v *Wise*. Accordingly, the common law will not impose a duty of care to run alongside a public law duty, save for very good reason.

Development of the law of negligence

[52] The law of negligence, particularly as applied to public authorities, has now to be understood in light of the seminal decisions of the Supreme Court in a trilogy of recent cases, viz *Michael* v *Chief Constable of South Wales Police* [2015] AC 1732, *Robinson v Chief Constable of West Yorkshire* [2018] A.C. 736 and *N v Poole BC* [2019] 2 WLR 1478.

[53] In *Michael*, the Supreme Court made it clear that it was a mistake to regard *Caparo Industries plc* v *Dickman* [1990] 2 AC 605 as establishing a tripartite test for the determination of whether and in what circumstances a duty of care may be owed by one person to another. Lord Reed returned to this theme in *Robinson*:

> "29. Properly understood, the *Caparo* case thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries."

Duty of care – public bodies

[54] So far as concerns the position of public bodies, our attention was drawn to passages in the judgment of Lord Reed in *N*, where he referred with approval to the earlier decisions

of the House of Lords in *Stovin* v *Wise* [1996] AC 923 and *Gorringe* v *Calderdale MBC* [2004] 1 WLR 1057, the significance of which, he said, "took time … to be fully appreciated": *N* para 34. A number of points can be taken from these cases which are of direct applicability to the present case:

(1) Public authorities may owe a duty of care in circumstances where private individuals would owe such a duty, unless that duty is inconsistent with or excluded by the terms of any legislation imposing or regulating the duty: *Stovin* v *Wise*, per Lord Hoffmann at 947, *Robinson*, per Lord Reed at paras 32-40, *N* at paras 31 and 65.

(2) Neither private individuals nor public bodies generally owe a duty of care to confer benefits on others: *N* at para 28. The distinction is drawn between causing harm, as in making things worse, and failing to confer a benefit, as in not making things better. This terminology conveys the rationale better than the traditional distinction between acts and omissions: and see also *Robinson* per Lord Reed at para 69 points 4 and 5. In the present case the duty allegedly owed by the Home Secretary is, in this terminology, a duty to confer a benefit by granting discretionary leave to remain and providing a status letter enabling the pursuer to access employment and/or benefits.

(3) In considering whether a public body is liable in damages to an individual claiming to have been harmed by its conduct, the first step is to ascertain whether the relevant legislation under which it is acting itself creates a private right of action. If the answer to that is in the negative, "it would be, to say the least, unusual if the mere existence of the statutory duty could generate a common law duty of care": *Gorringe*, Lord Hoffmann para 23 (and see also para 32). The same point is made by Lord Hoffmann in *Stovin* v *Wise* at page 952, cited with approval in *N* at para 31.

(4) It follows that except in a case where the relevant statute expressly or by implication itself creates a private right of action to run alongside the statutory duties incumbent on the public body, the mere existence of a statutory duty is not sufficient to give rise to a common law duty of care. There must be something more.

[55] Lord Reed provided a summary of the position in *N* at para 65:

> "65. It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

[56] It was Mr McIlvride's submission that the present case fell into the second category. In other words, the pursuer's case was based solely upon the existence of the statutory power or duty to grant discretionary leave to remain for a limited period and to issue a status document to that effect. As such it was bound to fail for the reasons set out by Lord Reed. Ms Crawford's response was that this was a case falling within both the first and third categories. There was no question here of such a duty being excluded by, or by implication from, the terms of the legislation. The "danger", viz the precarious situation in which an applicant for leave to remain in the United Kingdom finds herself, being unable to access work or benefits, was created by the Home Secretary. Her acceptance of the tribunal's ruling that removal from the United Kingdom would disproportionately interfere with the applicant's Article 8 rights, coupled with her policy setting out what was to happen in such circumstances, meant that she had assumed responsibility for ensuring that the

applicant was protected from that danger. If that meant imposing on the Home Secretary a common law duty of care to confer a benefit on the pursuer, so be it; the circumstances of the case justified that result.

[57] In *N*, at paras 66-73, Lord Reed discussed what is meant by an assumption of responsibility in this context. He emphasised that that did not mean that an assumption of responsibility could never arise from the performance of statutory functions. The distinction is between the statutory duty itself, which cannot give rise to a common law duty of care, and things undertaken in the performance of that duty, which might. Lord Reed concluded his review of the relevant authorities at para 73 in this way:

> "There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is *Phelps* v *Hillingdon*, where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owed to their employers. Another example is *Barrett* v *Enfield*, where the assumption of responsibility arose out of the local authority's performance of its functions under child care legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne* and *Spring* v *Guardian Assurance plc*."

[58] The question therefore comes to this: what has the Home Secretary done in the performance of her statutory obligations to justify the inference that she has assumed responsibility to the pursuer to take reasonable care to grant her discretionary leave to remain for a limited period and to issue her with a status document enabling her to access work and/or benefits? To my mind we have been shown nothing that would come anywhere near answering this question in favour of the pursuer. Ms Crawford was at pains to point out, under reference to remarks of Lord Bingham in *Customs and Excise Comrs.* v

Barclays Bank plc [2007] 1 AC 181 at para 8 and of Lord Steyn in *Gorringe* at para 2, that in each case the court must focus its enquiry on the particular facts and particular statutory background. I accept this, but, as already pointed out, we have been shown nothing which goes beyond a bare reliance on the Home Secretary's policy document. In my opinion the pursuer has failed to put forward any cogent basis for suggesting that the Home Secretary has assumed responsibility to individuals in the position of the pursuer to act in accordance with that policy document and to do so within a reasonable time. Put short she owes no common law duty of care. The argument seems to me to be just another way of saying that because the Home Secretary has a statutory duty to grant discretionary leave to remain for a limited period and to issue the appropriate status document, then she has a common law duty of care running alongside that statutory duty.

Other analogous cases?

[59] Before the sheriff, it was argued for the pursuer that the imposition of a common law duty of care could be justified on the basis that it was consistent with a number of analogous cases. Much attention was paid to *Kanidagli* and whether it should be regarded as disapproved by the Court of Appeal in *Mohammed*. Ms Crawford did not spend much time on this point. But she did not abandon it, and as well as *Kanidagli* referred to the first instance decisions in *McCreaner* v *Ministry of Justice* [2015] 1 WLR 354 and *Sebry* v *Companies House* [2016] 1 WLR 2499. It is necessary to consider those cases. I propose to do so chronologically.

[60] In *Kanidagli*[2], the Home Office had allowed the wife of a refugee into the United Kingdom but had mistakenly marked her status letter in such a way as to bar her from

[2] As noted in a footnote to the judgment of the Court of Appeal in *Mohammed*, the appeal in *Kanidagli* was allowed of consent, the Home Office having agreed to pay the claim in full.

claiming benefits. Keith J concluded that it was fair, just and reasonable that an administrative error of this kind, involving no judgement but simple administration and with a predictable financial effect for which there was no other remedy, should be regarded as arising out of a sufficiently proximate relationship to found a claim for damages. Key to his reasoning was the fact that the error in that case occurred after any policy decisions had been reached; it was purely a matter of implementation of what had already been decided. In reaching his decision, the judge distinguished the decision of the Court of Appeal in *W v Home Office* [1997] Imm AR 302 on the ground that the error in that case had occurred during the policy or decision-making stage.

[61] Some or all of the reasoning in *Kanidagli* was disapproved by the Court of Appeal in *Mohammed & Ors* v *Home Office* [2011] 1 WLR 2862. In that case a number of individuals sued the Home Office, alleging breaches of a duty of care at common law. Home Office officials had failed properly to implement Home Office policy with resulting detriment to the individuals concerned and to their applications (ultimately successful) for leave to remain. The leading judgment in that case was delivered by Sedley LJ. He rejected the idea that any common law duty of care was owed by the Home Office in respect of things that had occurred in the actual discharge of their functions. He rejected as "a distinction without a difference" the distinction drawn by Keith J in *Kanidagli* when seeking to distinguish between that case and the earlier decision of the Court of Appeal in *W*, essentially because the crass error shown to have occurred in *W* itself had little to do with the decision-making process in that case. It is arguable that that is not quite the distinction sought to be made by Keith J – he was focussing on the different stages of the process, decision-making on the one hand and implementation on the other, rather than on the nature of the error. However, it is unnecessary to resolve that question. The distinction between policy and operations,

between decision making and implementation of the decision, is no longer regarded as critical: see *N* at para 31, under reference to the opinion of Lord Hoffman in *Stovin* v *Wise*. To label something as mere operation or implementation does not, without more, mean that that activity is subject to a common law duty of care. More than that is needed, as discussed above.

[62] *McCreaner* v *Ministry of Justice* [2015] 1 WLR 354 was a case involving early release of prisoners. Cranston J held that after the Home Office policy had been established, the prison authorities owed the prisoner a common law duty of care to implement that policy. In the course of reaching the decision, the judge distinguished the cases of *W* and *Mohammed* on the grounds that those cases had concerned acts or omissions during and forming part of the policy or decision-making process, whereas in the case before him the failure was at the implementation stage: see in particular para 44. That is the same distinction as was made by Keith J in *Kanidagli*. It is not clear whether *Kanidagli* was cited, but clearly the judge was referred to *Mohammed* which in turn contained a critical reference to *Kanidagli*. Without meaning to cast doubt upon the decision on that aspect of the case, it seems to me that the judge there paid rather more respect to the distinction between policy and operations than would now be given to it in light of the recent Supreme Court authorities.

[63] The case of *Sebry* v *Companies House* [2016] 1 WLR 2499 arose out of an incorrect entry in the companies register to the effect that a particular company had gone into liquidation, when in fact the information which was received by Companies House and which ought to have been recorded on the register related to a different company. As a result the company wrongly shown to have gone into liquidation went out of business. The error was due to a systemic failure to ensure that policies were correctly applied and/or to an individual act of carelessness. Edis J held that that the registrar owed a common law duty, to take reasonable

care to ensure that a winding up order was not registered against the wrong company. He so held on three separate but overlapping grounds: (i) assumption of responsibility; (ii) the *Caparo* three-stage test; and (iii) the incremental approach.

[64] So far as concerned assumption of responsibility, the judge referred to a number of cases in which it had been said that any assumption of responsibility must be "voluntary". Having referred to a passage in the speech of Lord Nolan in *White* v *Jones* [1995] 2 AC 207 at 294, the judge said this (at para 109):

> "I understand this to mean that if a person does an act which is capable of causing harm to a particular person if done carelessly he will be held to have assumed responsibility to that person in respect of that task unless (where the act is done further to a contractual duty or statutory function) the terms of the contract or the statute negate or limit that responsibility."

As I read this passage, the judge is saying that performance by a public body of a statutory duty may without more give rise to a common law duty of care unless such a duty is excluded by the terms of the relevant legislation. This does not sit easily with the remarks of Lord Hoffman in *Gorringe* and in *Stovin* v *Wise* cited above and quoted with approval by Lord Reed in *N* (see in particular at paras 31 and 65).

[65] The judge's analysis in terms of the *Caparo* three-stage test was given before the decisions in *Robinson* and *N* and the greater understanding of *Caparo* which emerges from the judgments in those cases. I need say nothing about the judge's approach to the incremental test. Each case will fall to be decided on its own facts and the judge in that case went into the relevant facts in great detail before arriving at the conclusion that a duty of care was owed to a very limited class of persons in respect of a limited class of acts. I do not consider that this decision assists the pursuer in the present case.

[66] For these reasons I do not consider that these first instance decisions provide any assistance to the pursuer. They do not support the assumption of responsibility argument in

this case. Nor do they provide a basis for proceeding to find a common law duty of care here by analogy with other cases.

[67] It is impossible not to feel some sympathy for the pursuer in the circumstances of this case. She did, however, have two possible means of redress. First, she could have petitioned for judicial review based on the principle of legitimate expectation. Second, she could have made a complaint to the Parliamentary Ombudsman.

Disposal

[68] I would hold that the pursuer's case is irrelevant and should not be admitted to proof. I would allow the appeal, sustain the first plea in law for the defender (the Home Secretary), and dismiss the action. I would reserve all questions of expenses.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 47
XA128/19

Lord Justice Clerk
Lord Glennie
Lord Woolman

OPINION OF LORD WOOLMAN

in the appeal

by

THE RIGHT HONOURABLE LORD KEEN OF ELIE, Her Majesty's Advocate General for Scotland, as representing the Secretary of State for the Home Department

Defender and Appellant

against

MICHELLE ADEWEMIMO ADIUKWU

Pursuer and Respondent

Defender and Appellant: McIlvride QC, Pugh; Morton Fraser LLP
Pursuer and Respondent: Crawford QC, Dewar; Drummond Miller LLP

14 August 2020

[69] I have had the benefit of reading the opinions of the Lord Justice Clerk and Lord Glennie. I agree with their reasoning and conclusions. I wish to add a few brief observations.

[70] It is just and appropriate for this court to address the merits of the pursuer’s argument, despite it having no sure foundation in her pleadings. That is subject to one

qualification. There is no basis for a claim based on maladministration. That would require specific averments of malice or want of probable cause.

[71] The sheriff held that the Home Secretary could owe a duty of care to the pursuer. In reaching his decision he wrongly relied on *(R) Kanidagli* v *SSHD* [2004] EWHC 1585 (Admin). The decision of the Court of Appeal in *Mohammed & Ors* v *Home Office* [2011] 1 WLR 2862 pointed to the opposite conclusion.

[72] Matters have, however, moved on since then. The Supreme Court has revisited this branch of the law. It has set out the relevant principles in *Michael* v *Chief Constable of South Wales Police* [2015] AC 1732, *Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736, and *N & Anor* v *Poole Borough Council* [2019] 2 WLR 1478.

[73] In *N* Lord Reed advanced three propositions (at para 65), the second being that:

> "public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm"

[74] This case falls four-square into that category. The Home Secretary could have prevented the pursuer from suffering harm by expeditiously issuing a status letter. But that does not justify the imposition of a duty of care.